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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. YVETTE HOLLIE, Defendant and Appellant.	A125349 (Solano County Super. Ct. No. FCR217383)

BACKGROUND

In 2007 a jury convicted Yvette Hollie on count two of a two-count indictment, assault with a deadly weapon on the victim—James Ingram.[1] (Pen. Code, § 245, subd. (a)(1).)[2] The jury also found true an allegation that Hollie had personally inflicted great bodily injury (GBI) under circumstances involving domestic violence (§ 12022.7, subd. (e)), and two special sentencing circumstances in aggravation: (1) the crime involved great violence, great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness, and (2) Hollie was armed or used a weapon at the time of the crime. Hollie was sentenced to the aggravated term of four years in state prison on count two, and to a consecutive, aggravated five-year term on the enhancement, for a total term of nine years. The Honorable Ramona Garrett was the sentencing judge.

[1] Hollie was acquitted on count one, attempted murder. (Pen. Code §§ 187, 664.)

[2] Unless otherwise specified, all further statutory references are to the Penal Code.

In an unpublished opinion filed on January 16, 2009, we ultimately agreed with one of Hollie's contentions—that her defense counsel provided ineffective assistance by failing to object to the imposition of the upper term on the GBI enhancement. We thus reversed the judgment and remanded the matter to the trial court for the limited purpose of "resentencing consistent with this opinion." (*People v. Hollie* (Jan. 16, 2009, A118315) [nonpub. opn.].)

Our remittitur issued on March 18, 2009, and by order dated March 23[3] Judge Garrett set the matter for April 8 to set resentencing, which on that date was set for May 11. On May 7 Hollie's counsel, John Coffer—the same counsel who had represented her in the trial but not on the appeal—moved to continue the resentencing due to a calendar conflict, which Judge Garrett granted, rescheduling the resentencing to June 19. It was rescheduled, by stipulation, to June 24. On June 11 Hollie's counsel filed a memorandum of points and authorities urging the low term of three years on the enhancement. The resentencing in fact occurred on June 24, held against the background of our opinion.

Our Prior Opinion

After exposition of the facts and the rejection of Hollie's claim of instructional error, we reached the issue of the "Imposition of the Upper Term on the GBI Enhancement." (*People v. Hollie, supra*, A118315, p. 12) After three pages of factual discussion of what had occurred, we turned to an extensive analysis of the issue. It was as follows:

"Hollie argues that, while the trial court may have correctly relied on her prior convictions to impose the upper term on the underlying assault with a deadly weapon (ADW) count, imposition of the upper term on the GBI enhancement violated dual use proscriptions as well as her federal constitutional rights as set forth in *Cunningham* [*v. California* (2007) 549 U.S. 270 (*Cunningham)*]. Hollie also argues that to the extent that her trial counsel improperly failed to object on dual use or *Cunningham* grounds at the

[3] Unless otherwise indicated, all further dates refer to 2009.

time of sentencing, then her trial counsel provided ineffective assistance in violation of her rights under the Sixth and Fourteenth Amendments to the federal constitution.

"We conclude that imposing the upper term on the enhancement based on the aggravating factors set forth in the probation officer's report and discussed at the time of sentencing would have violated dual use proscriptions. However, it is unclear from the record whether the trial court in fact relied on those particular aggravating factors in imposing the upper term. Because of this ambiguity, and because the court expressed concern about dual use problems during the sentencing hearing, we also conclude that Hollie's counsel provided her with ineffective assistance by failing to object when the court announced the sentence. Consequently, the matter should be remanded for the limited purpose of resentencing.

"Our Supreme Court in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), explained that '[a]lthough a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited to some extent. For example, the court generally cannot use a single fact both to aggravate the base term and to impose an enhancement, nor may it use a fact constituting an element of the offense either to aggravate or to enhance a sentence.' (*Id*. at p. 350; see also Cal. Rules of Court, rule 4.420(d) ['a fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term']; § 1170, subd. (b) [a court 'may not impose an upper term by using the fact of any enhancement upon which sentence is imposed'].) Similarly, '[t]he same fact cannot be used to impose an upper term on a base count and an upper term for an enhancement.' (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1516, fn. 12 (*Velasquez*).)

"Based on these authorities, the sentencing court here did not violate any dual use proscriptions when it relied on Hollie's significant prior record and the fact that it was increasing in seriousness (Cal. Rules of Court, rule 4.421(b)(2)) to impose the upper term on the ADW count. (See also *People v. Black* (2007) 41 Cal.4th 799, 805, 816, 818 [there was no *Cunningham* violation either].) However, the court could not use that same

aggravating factor to impose the upper term on the GBI enhancement. (*Velasquez, supra,* 152 Cal.App.4th at p. 1516, fn. 12.)

"Moreover, the court could *not* have properly relied on the other three aggravating factors in the probation officer's report to impose the upper term on the GBI enhancement. In a nutshell, using any of those three aggravating factors would have been tantamount to using the fact that Hollie stabbed Ingram with a knife both to impose the GBI enhancement itself and to impose an aggravated term for that enhancement.

"While actual infliction of GBI is not an element of ADW (§ 245, subd. (a)(1); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261), it obviously is an element of the GBI enhancement. (§ 12022.7, subd. (e).) There was no substantial evidence in this case that Hollie inflicted GBI by any means other than by using the knife to stab Ingram. (Cf. *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1777 (*Garcia*) [there was no dual use problem where there 'was substantial evidence . . . that defendant threatened the victims with great bodily injury by means distinct from his gun use' [Fn. omitted.] Consequently, the sentencing court could not rely upon the fact that Hollie inflicted GBI, or the fact that she used a knife to do so, to impose the upper term on the GBI enhancement. To do so would constitute an improper dual use of the same fact both to impose an enhancement and to impose the upper term on the same enhancement. (*Scott, supra,* 9 Cal.4th at p. 350; *Garcia, supra,* 32 Cal.App.4th at p. 1777; *People v. Coleman* (1989) 48 Cal.3d 112, 165 ['On remand, the trial court should avoid any reliance on the same fact (e.g., defendant's use of the knife) for both an upper term and an enhancement'].)

"Both of the aggravating factors found true by the jury were based on the fact that Hollie inflicted GBI with the knife: 1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; and (2) Hollie was armed with or used a weapon at the time of the commission of the crime. (Cal. Rules of Court, rule 4.421(a)(1), (2).) Consequently, if the court relied on either of these two aggravating circumstances to impose the upper term on the GBI enhancement, there was an impermissible dual use of a

single fact. (See *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1028 [with respect to 'the great violence/threat of great bodily harm factor,' noting that the 'only conclusion the evidence permits is that it was only the presence of the firearms that justified a fact finding that there was threat of great bodily harm']; *People v. Bennett* (1981) 128 Cal.App.3d 354, 359 [there was improper dual use where the gun use which was the basis of a firearm enhancement was also relied upon to impose upper terms on the robbery counts and where the only evidence of a threat of great bodily harm with respect to the great violence/threat of great bodily harm factor was 'the gun use itself']; *People v. Calhoun* (1981) 125 Cal.App.3d 731, 734 ['where the threat of violence is based on the use of a weapon, the sentencing court may not use this fact to both aggravate and enhance the defendant's sentence'].)

"The final aggravating factor from the probation officer's report is 'Rule 4.421 (b)(1): The defendant has engaged in violent conduct which indicates a serious danger to society.' The jury was not asked to consider this factor. The trial court concluded with respect to the ADW count that this factor 'is a component of the offense before the Court.' We agree with the trial court that this factor encompasses an element of the base conviction, because the only 'violent conduct' posing a 'serious danger to society' here was Hollie's use of the knife to stab Ingram. (See *People v. Smith* (1997) 57 Cal.App.4th 1470, 1481 [ADW consists of 'two elements, (1) the assault, and (2) the means by which the assault is committed'].) For the same reason, it also encompasses the GBI element of the GBI enhancement and could not be used to impose the upper term on the enhancement. (§ 12022.7, subd. (e); *Scott, supra,* 9 Cal.4th at p. 350.)

"Based on the foregoing, it is clear that in imposing the upper term on the GBI enhancement, the trial court should not have relied on any of the aggravating factors which were set forth in the probation officer's report and which the court discussed in the context of imposing the upper term for the ADW count. If this is what the sentencing court did, such an error would require remand for resentencing because it would be reasonably probable that on remand Hollie would be sentenced to the middle term on the GBI enhancement, shortening her sentence by a full year. (See *People v. Price* (1991) 1

Cal.4th 324, 492 [the prejudice standard for remand for resentencing]; § 12022.7, subd. (e) [the upper term for this GBI enhancement is 5 years; the middle term is 4 years].)

"However, it is not clear whether the trial court in fact relied on those factors in imposing the upper term for the GBI enhancement. The court apparently was well aware of the dual use issues with respect to the base count for ADW: it discussed the issue during the sentencing hearing and was careful to avoid relying on anything but Hollie's prior criminal record when imposing the upper term for the base count. However, there was no discussion during the sentencing hearing about the dual use issues posed specifically by the GBI enhancement, and the court did not explain which aggravating factors it was relying upon to impose the upper term on that enhancement. Instead, the court ambiguously stated that it was imposing the upper term on the enhancement because 'the factors in aggravation outweigh the factors in mitigation.'

"The Attorney General asserts that '[d]ual use of facts is not apparent from this statement' by the sentencing court. However, that is precisely the problem–we cannot tell what the court was relying upon in imposing the upper term on the GBI enhancement. The court had an obligation to 'state "reasons" for its discretionary choices on the record at the time of sentencing. [Citations.] Such reasons must be supported by a preponderance of the evidence in the record and must "reasonably relat[e]" to the particular sentencing determination. [Citation[].] No particular wording is required, but courts typically rely on applicable sentencing factors set forth in the statutory scheme and the rules.' (*Scott, supra,* 9 Cal.4th at pp. 349-350, fn. omitted.) This rule applies to enhancements as well as to underlying substantive offenses. (*Id*. at p. 350, fn. 13.) The 'purpose for requiring the court to orally announce its reasons at sentencing is clear. The requirement encourages the careful exercise of discretion and decreases the risk of error. . . . The statement of reasons also supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error.' (*Id*. at p. 351.)" (*People v. Hollie, supra,* A118315, at pp. 15-19.)

We then concluded that Hollie's counsel was ineffective, with this final observation: "As noted above, Hollie's counsel raised the dual use issue in his sentencing brief with respect to both the base count and the GBI enhancement, and briefly raised the dual use issue in general terms during the initial portion of the sentencing hearing. However, counsel failed to raise the issue specifically with respect to the GBI enhancement during the hearing, and he did not object when the trial court imposed the upper term on the GBI enhancement. 'The record is clear that [Hollie's] counsel was well aware of the court's sentencing choices and had a meaningful opportunity to object.' (*People v. Velasquez, supra,* 152 Cal.App.4th 1503, 1511.) As discussed above, the sentencing court went out of its way to avoid a dual use problem, and undoubtedly would have been responsive to an objection by Hollie's counsel at the time it imposed the upper term on the GBI enhancement. Consequently, 'by failing to object, [Hollie] has forfeited [her] claim the upper term[is] improper because the trial court did not state its reasons for selecting [that term.]' (*Ibid.*) But even if Hollie did forfeit the sentencing error here, we must still remand the matter for resentencing. Hollie has asserted a valid claim of [ineffective assistance of counsel] based on her counsel's failure to object." (*People v. Hollie, supra,* A118315, at pp. 19-20.)

With that conclusion, we "reversed and remanded the matter for the purpose of resentencing consistent with [our] opinion." (*People v. Hollie, supra,* A118315, at p. 21.)

The Resentencing

The resentencing occurred, as noted, on June 24, with Hollie represented by the same counsel who had represented her at trial and the original sentencing. The relevant portions of the hearing were as follows:

"THE COURT: . . . The matter is on today for resentencing. The Court has reviewed the decision from the Court of Appeal, and I've also reviewed the brief submitted by the defense counsel.

"At this time, I am prepared to hear comments regarding the appropriate sentence to impose on the enhancement, pursuant to Penal Code section 12022.7[, subdivision] (e). And we'll start with Mr. Coffer.

"MR. COFFER: Your Honor, thank you. I don't know that I have much more to add to my brief. My view, of course, is that we're here only on the 1203.7(e). I think the appellate court has limited the court's option only to the extent that I don't think the court can impose the high term now. That's my view, at least, based on the review of the law as I set it out in my brief.

"Obviously, that remains the midterm, the low term, and I'll describe why I believe the low term is applicable. The factors in mitigation certainly are the most prevailing factors in this particular case. There were a number of them that I cited in my brief. I think the facts as believed by the jury, were that at least initially—and I do want to underscore that, at least initially, my client was not the aggressor, but Mr. Ingram, the victim, was the aggressor in the case.

"We've submitted a sentencing brief, originally, as the court may recall. Attached to that sentencing brief were interviews with the jurors in this case, and three of the twelve jurors stated to my investigator that they believe that Mr. Ingram had attempted to rape or at least sexually—be sexually aggressive toward my client.

"THE COURT: That she was acting in self-defense.

"MR. COFFER: Initially. Initially. But they did believe that she went beyond her right of self-defense when she got the knife and used it to stab Mr. Ingram, and that's why they did not find her not guilty. They believed that any defense she might have had, she exceeded, ant that's why they convicted her.

"Nevertheless, it is a factor that the court may consider in deciding whether or not this should be a mitigated sentence, sentenced to state prison. And I would ask the court to view it in that light.

"So I think that is the most important factor in mitigation. As well, we believe that Ms. Hollie suffered from a psychological defect, not amounting to a defense in this case, and we did submit some information from a psychologist with our initial sentencing brief, that I think supports the idea that Ms. Hollie suffered from some mental illness that may have effected [*sic*] her ability to make correct judgments. It doesn't excuse her under the

law, it's not a defense to the charge, but it may in fact be a mitigating factor when imposing sentence.

"So we would ask the court . . . to consider those factors in deciding what the appropriate sentence is on that enhancement. And we would, at least at this point, with those comments, will submit it.

"THE COURT: All right. Thank you. Ms. Ray, on behalf of the People.

"MS. RAY: Well, I agree that I think the Court of Appeal[] has limited the court to sentencing between the low term and midterm on the enhancement. I don't know that I agree with the appellate court on saying this court was ambiguous in her sentencing.

"In fact, I think this court always makes a great record when you sentence, but here we are. And I think the court correctly points out that this should be a midterm sentence. I don't think there are mitigating factors. I disagree with counsel's assertion that the jury found that this was somehow a self-defense case. The court even declined to give self-defense instructions, because the defendant, by her own testimony, could not come up with a self-defense theory when she testified.

"So I think that there are no mitigating or aggravating factors. The court used the aggravating factor in the underlying crime, which the Court of Appeal points out. And I had to get the transcript, to make sure that was correct, because I knew there [were] aggravating factors used.

"We did this as a *Cunningham* type of verdict, and those were subsumed into the crime itself. And then the court used the prior record as the aggravating factor on the 245.

"So I think there are no mitigating factors that would outweigh the facts of this case, and I think [the] midterm is appropriate for the enhancement.

. . .

"THE COURT: The court, at this time, then, is prepared to vacate the previously imposed sentence on the enhancement pursuant to 12022.7[, subdivision] (e). The high term had been imposed by this court, and that sentence is hereby vacated.

"The court will impose the midterm of four years. I do not find the [mitigating] factors that have been presented to the court sufficient to convert this to a low term case, and therefore, I am imposing the four-year sentence.

"The sentence imposed on the substantive charge will remain unchanged. The appellate court had no concerns with that sentence.

"And so, the aggregate term is reduced from nine years to eight years."

Hollie filed a timely notice of appeal, and asserts three claims of error. We conclude that none of the claims has merit, and we affirm.

ANALYSIS

Hollie's first argument is that Judge Garrett erred in failing to order an "updated presentence report," an argument premised on the statement, unchallenged by the People, that "there is no indication in the record on appeal, in any of the minutes of proceedings, or in other court documents after issuance of the remittitur that the trial court ordered preparation of a supplemental or updated probation report to resentencing on June 24, 2009."

"California Rules of Court, rule 4.411(c) provides: 'The court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.' " (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180.) The Advisory Committee Comment to rule 4.411(c) states that "Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court, . . ." (Advisory Com. com., West's Cal. Rules of Court (2009 ed.) foll. Rule 4.411(c), p. 238.) As noted in *People v. Dobbins*, "a period of more than six months may constitute a significant period of time." (*People v. Dobbins, supra,* 127 Cal.App 4th at p. 181.)

Here, the original probation report was prepared and filed on June 7, 2007, and, as noted, Hollie was resentenced on June 24, 2009, over two years later. A supplemental report was presumptively required, and we assume for purposes of discussion that it was error not to order one. However, Hollie has not shown that such error was prejudicial.

People v. Dobbins, *supra*, 127 Cal.App.4th 176, on which Hollie relies, is persuasive—but not for Hollie. *Dobbins* first held that a supplemental report was required. But, Justice Sims went on: "Defendant suggests reversal is automatic. On this point, however, we disagree. We perceive no federal constitutional right to a supplemental probation report. Because the alleged error implicates only California statutory law, review is governed by the *Watson* harmless error standard. (See *People v. Watson* (1956) 46 Cal.2d 818, 834-836; see also *People v. Mower* (2002) 28 Cal.4th 457, 484. That is, we shall not reverse unless there is a reasonable probability of a result more favorable to defendant if not for the error. (*Watson, supra,* at p. 836.) And this is not a case in which we must speculate concerning how information in a probation report could have affected the trial court's decision. [Citations.] . . . Considering the peculiar facts of this case, there is no doubt the result would have been the same if a supplemental probation report had been prepared." (*People v.Dobbins, supra,* 127 Cal.App.4th at pp. 182-183.) Likewise here.

The June 2007 presentence report prepared here was extensive, totaling 25 pages with its exhibits. The thorough report noted in pertinent part that the jury had found true two California Rules of Court, rule 4.421(a) circumstances in aggravation: (1) "the crime involved great violence . . . or other acts disclosing a high degree of cruelty, viciousness, or callousness" and (2) Hollie was armed with a weapon at the time of the crime (which, the report noted, was an element of the offense, and may not apply pursuant to Pen. Code § 654). The report noted but a single circumstance in mitigation—Hollie's prior performance on probation. In short, the June 2007 report included reference to all California Rules of Court, rule 4.423 criteria pertinent to "mitigation." And, we ask, what could a supplemental report have added, save reference to Hollie's months of confinement in prison—which, not incidentally, is not a circumstance in mitigation.

Hollie suggests nothing that might have been included, and contents herself with reference to *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556, fn. 7, which she cites for the proposition that a "defendant can rely on behavior during appeal to argue for reduction of term of imprisonment at resentencing." The footnote does contain that

statement, but not in a way that avails Hollie. To the contrary, the footnote reads as follows: "We also agree with the People's contention that defendant has not established that the failure to obtain the report was prejudicial. Obtaining a supplemental or current probation report allows the court to consider, among other factors, the defendant's conduct during an appeal. [Citation.] . . . [D]efendant can rely on his behavior during the appeal to argue for a *reduction* of his term of imprisonment at resentencing. [Citation.] Who better than defendant would know whether a supplemental report disclosing his post-conviction behavior would disclose a basis for reducing the term of imprisonment upon resentencing? One might infer from the failure to request a supplemental report or to object to the court's proceeding without one that defendant knows the report will not benefit him. From this one could infer not only that the error is harmless but also that defendant knowingly waived his right to a supplemental probation report. . . . A defendant should not be allowed to stand silent when the court proceeds without a supplemental probation report, gamble that a trial court will impose a lesser term of imprisonment and then urge reversal for the failure to obtain the report without being required to make some showing that he was prejudiced thereby." (*People v. Begnaud, supra,* 235 Cal.App.3d at 1556, fn. 7.)

The failure to obtain a supplemental report was not reversible error.

Judge Garnett Did Not Err In Refusing To Reconsider The Sentence on Count Two

Hollie's second argument is that Judge Garnett "erred and abused [her] discretion by failing to understand [the] sentencing authority to reconsider or reconfigure appellant's entire sentence on remand." Relying primarily on *People v. Burbine* (2003) 106 Cal.App.4th 1250 and its progeny, Hollie asserts "that a remand for resentencing vests the trial court with jurisdiction only over that portion of the original sentence pertaining to the count that was reversed, and not over his sentence for the affirmed counts. Such a view, as emphasized by the court in *Burbine*, 'assumes that a felony sentence for a multiple-count conviction consists of multiple independent components, rather than being an integrated whole—a view that has been repeatedly rejected by other

courts that have considered the issue.' (*Id.* at p. 1257.)" Hollie goes on to cite, however inappropriately, [4] *People v. Lincoln* (2006) 144 Cal.App.4th 1016, review granted September 12, 2007, *People v. Bautista* (2005) 129 Cal.App.4th 1431, and *People v. Williams* (2004) 120 Cal.App.4th 209, review granted June 8, 2005.

None of the cases cited by Hollie involves what happened here: our holding that the sentencing court did not violate any dual use proscriptions when it relied on Hollie's significant prior record and the fact that it was increasing in seriousness to impose the upper term on assault with a deadly weapon—a holding understood by all interested parties.

Hollie filed a resentencing brief which stated that this court "upheld the trial court's imposition of the upper term for the [section] 245[, subdivision] (a)(1) conviction, but reversed the sentence on the enhancement. The resentencing on the enhancement, pursuant to [section] 12022.7 [subdivision] (e), is the only issue before this court."[5] The prosecutor agreed that "the Court of Appeal[] has limited the court to sentencing between the low term and midterm on the enhancement." And so did Judge Garrett.

Hollie's Claim of Ineffective Assistance Of Counsel Has No Merit

As quoted above, in resentencing Hollie to the midterm of four years on the GBI enhancement, Judge Garrett stated as follows: "The court, at this time, then, is prepared to vacate the previously imposed sentence on the enhancement pursuant to [section] 12022.7[, subdivision] (e). The high term has been imposed by this court, and that sentence is hereby vacated. [¶] The court will impose the midterm of four years. I do not

[4] As indicated by our citations, the Supreme Court has granted review of two of the three cases cited by Hollie. Thus, these cases are not properly citeable. (See Cal. Rules of Court, rule 8.1105(e)(1).)

[5] The People cite to this as a manifestation of "invited error." We do not decide this issue, nor the People's alternative argument that Hollie's failure to object constituted a waiver.

find the [mitigating] factors that have been presented to the court sufficient to convert this to a low term case, and therefore, I am imposing the four-year sentence."

Hollie's last argument is that "trial counsel at sentencing again rendered ineffective assistance . . . by failing to object to the trial court's failure on remand to state any reasons for imposing the middle term on the section 12022.7, subdivision (e), enhancement." This claim is meritless.

Hollie, of course, has the burden of proving a claim of ineffective assistance of counsel. (*People v. Cox* (1991) 53 Cal.3d 618, 655.) To do so, she must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) "To be entitled to relief based on ineffective assistance of counsel, [defendant] has the burden of showing counsel's performance was inadequate and of affirmatively demonstrating he was prejudiced by trial counsel's errors. [Citation.]" (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1234-1235.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny [citation]'. . . . 'Although deference is not abdication . . . courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' " (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Hollie contends that her counsel rendered ineffective assistance failing to object to a claimed failure to state reasons for imposing the middle term for the great bodily injury enhancement. (See § 1170, subds. (b) & (c); Cal. Rules of Court, rules 4.406 & 4.420.) As quoted above, Judge Garrett gave a reason for imposing the middle term finding that the "factors that have been presented to the court [were in]sufficient to convert this to a low term case." There was, in short, no failure to which to object.

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.